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July 7, 2004

FILED ELECTRONICALLY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Provision of Directory Listing Information Under the Communications Act of 1934, As Amended*, CC Docket No. 99-273
Ex Parte Communication

Dear Ms. Dortch:

This letter responds to the April 7, 2004 *ex parte* letter of Verizon¹ and the May 21, 2004 *ex parte* letter of SBC Communications, Inc. (SBC)² concerning InfoNXX, Inc.'s (InfoNXX's) position on ILEC disclosure of nonpublished and nonlisted subscriber information (referred to collectively herein as "nonpublished subscriber information") to non-ILEC DA providers. InfoNXX continues to urge the Commission to affirm that local exchange carriers (ILECs) are required to disclose to non-ILEC directory assistance (DA) providers *all* of the nonpublished subscriber information – on the same terms – that the ILECs make available to their own operators. The Commission also should affirm that ILECs may not impose restrictions on the use of DA information that interfere with the ability of non-ILEC DA providers to offer their customers a full range of DA-related services.

The *Verizon April 7 Ex Parte* and the *SBC May 21 Ex Parte* misapprehend the scope of InfoNXX's response to the pending SBC/BellSouth Petition for Clarification or Reconsideration of the Commission's First Report and Order.³ Based on this misunderstanding, Verizon and SBC seek the right to impose broad and unnecessary restrictions on the use of DA listings by

¹ *Ex Parte* Letter from Ann D. Berkowitz, Associate Director of Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 99-273 (Apr. 7, 2004) (*Verizon April 7 Ex Parte*).

² *Ex Parte* Letter from Toni Acton, Associate Director, SBC Telecommunications, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 99-273 (May 21, 2004) (*SBC May 21 Ex Parte*).

³ Petition for Clarification or, in the Alternative, Reconsideration of SBC Communications, Inc. and BellSouth Corp., CC Docket No. 99-273 (Mar. 23, 2001) (SBC/BellSouth Petition).

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non-ILEC DA providers. The Commission should reject these requests and affirm, consistent with the principle of non-discrimination embodied in Section 251(b)(3), that (1) non-ILEC DA providers must have access to all the subscriber information available to or used by the ILECs' own operators (and can offer the same nonpublished number services that the ILECs provide to their own customers), and (2) ILECs may not impose unilateral use restrictions that interfere with the ability of non-ILEC DA providers to offer a variety of innovative DA-related services to consumers.

Access to and Use of Nonpublished Subscriber Information

Verizon and SBC assert that they provide non-ILEC DA operators with the nonpublished subscriber information that can be viewed by or is supplied to the ILECs' own operators, and that this is all the information non-ILEC DA operators have a right to access. InfoNXX's response to this argument, as explained in its *ex parte* letter of April 28, 2004,⁴ is two-fold.

First, InfoNXX has clarified that it has sought and continues to seek access only to the nonpublished subscriber information used by the ILECs' own operators.⁵ This is fully consistent with Section 251(b)(3) of the Communications Act and with the Commission's decision in the *First Report and Order*.⁶ Thus, InfoNXX does not seek access to more subscriber information than it has a right to access under the Communications Act and the Commission's Rules.

Second, InfoNXX has urged the Commission to seek more complete information from the ILECs about the full scope of access the ILECs' operators in fact have to nonpublished subscriber information.⁷ As explained in the *InfoNXX April 28 Ex Parte*, evidence from the

⁴ See *Ex Parte* Letter from Gerard J. Waldron, Attorney for InfoNXX, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 99-273 (Apr. 28, 2004) (*InfoNXX April 28 Ex Parte*).

⁵ See *InfoNXX April 28 Ex Parte* at 2; see also *Ex Parte* Letter from Gerard J. Waldron, Counsel to InfoNXX, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 99-273 (Mar. 30, 2004) (*InfoNXX March 30 Ex Parte*) (including accompanying Affidavit of Margaret Scholl, CEO North America of InfoNXX).

⁶ See *First Report and Order, Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, CC Docket No. 99-273, 16 FCC Rcd 2736, 2742 (2001) (*First Report and Order*) ("[T]he Commission has ruled – and subsequently clarified its rules to emphasize – that, under Section 251(b)(3), LECs . . . must provide *nondiscriminatory* access to their directory assistance databases.") (emphasis added); see also *id.* at 2749 ("[I]n the *Local Competition Second Report and Order*, we concluded that competitors receiving LEC directory assistance information would be held to the same standards as the providing LEC in terms of the types of information that they could legally release to third parties.").

⁷ *InfoNXX April 28 Ex Parte* at 2-3.

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ILECs' own tariffs indicates that their operators have sufficient access to nonpublished subscriber information to enable the operators to connect callers to subscribers with nonpublished or nonlisted numbers in the event of an emergency and in other circumstances.⁸ To give full effect to the nondiscrimination requirement in Section 251(b)(3) and to accomplish the pro-competitive goals of the *First Report and Order*, non-ILEC DA providers like InfoNXX must have access to all the information necessary to provide these same types of services to their customers.⁹ Otherwise, non-ILEC DA providers would be unable to compete on an equal footing with ILEC DA services. For example, a CLEC seeking to obtain third party DA services might feel compelled to obtain service from the ILEC rather than from InfoNXX because the ILEC would be in a position to offer nonpublished number services not available from InfoNXX. Accordingly, InfoNXX has asked the Commission to require each major ILEC to provide the following information to the Commission:

1. What nonpublished subscriber information do the ILEC's operators *see* when they access the ILEC's DA database?
2. What nonpublished subscriber information do the ILEC's operators have available or *make use of*, even if the operator cannot *see* the information?
3. What services does the ILEC provide using nonpublished subscriber information, including but not limited to message delivery and/or call connection services in emergency and/or non-emergency situations?

The Commission should then ensure (though an explicit requirement and effective enforcement thereof) that ILECs afford non-ILEC DA providers access to all the subscriber information available to or used by the ILECs' own operators. Such access is necessary to enable non-ILEC DA providers to offer the same nonpublished number services the ILECs provide to their own customers. To the extent that an ILEC's own operators' access is limited, a nonpublished or nonlisted number also could be masked from a non-ILEC DA provider's operators and only available to certain authorized personnel or in certain circumstances. But the information must be available to the non-ILEC DA provider to the full extent it is or can be made available to the ILEC's operators. Moreover, the nonpublished subscriber information provided to non-ILEC DA providers should include any electronic identifier used by the ILEC to identify

⁸ See *InfoNXX April 28 Ex Parte* at 2-3 (describing Verizon New York tariff offering emergency contact service for subscribers with nonpublished information and Qwest tariffs describing release of nonpublished information to emergency service providers and to "customers on a call-by-call basis").

⁹ See *First Report and Order*, 16 FCC Rcd at 2742 ("The purpose of Section 251(b)(3) . . . is to allow all market participants to compete by creating a level playing field.").

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or route calls to the subscriber. Finally, the information provided to non-ILEC DA providers should also include all DA information made available to *any* ILEC operator, whether such operator is classified as a DA operator, Operator Services (OS) operator, or otherwise.

Contractual Use Restrictions

The *Verizon April 7 Ex Parte* and the *SBC May 21 Ex Parte* also seek broad rights to impose contractual restrictions on the use of subscriber information by non-ILEC DA providers. Again, many of the examples provided to justify the need for this right presume uses of DA information that simply are not contemplated. InfoNXX has made clear in previous filings that it seeks access to ILEC subscriber information for purposes of providing telephonic DA and DA-related services. Nonetheless, Verizon expresses concern about the privacy of its subscribers' information based on the potential use of DA information for telemarketing purposes, to publish a print directory, and to create a Calling Name and Address (CNAM) database.¹⁰ There is no reason to believe that non-ILEC DA providers contemplate using ILEC DA information for such purposes.

Like Verizon, InfoNXX is committed to protecting the privacy of the DA information in its databases. For example, InfoNXX adheres to BS 7799, the British Standard (international counterpart BS ISO/IEC 17799) specifying best practices for information security management within business organizations. InfoNXX and other providers can protect privacy as effectively as Verizon. But the Commission should not permit these legitimate privacy issues to distort competition.

Consistent with the *First Report and Order*, InfoNXX has asked the Commission to affirm that ILECs may not impose or require any contract provisions (including alternative pricing provisions) that restrict or narrow in any way the ability of non-ILEC DA providers to make full use of subscriber information to provide a full range of DA and DA-related services (including information services that build on or incorporate DA information) to consumers. The Commission rightfully declared in the *First Report and Order* that "[S]ection 251(b)(3)'s requirement of nondiscriminatory access to a LEC's DA database does not contemplate continuing veto power by the providing LEC over the uses to which DA information is put. Once carriers or their agents obtain access to the DA database, they may use the information as they wish, as long as they comply with applicable provisions of the Act and our rules."¹¹

¹⁰ *Verizon April 7 Ex Parte* at 3-4.

¹¹ 16 FCC Rcd at 2749. *See also id.* ("We disagree with commenters . . . that maintain that a competing DA provider may not use the DA database for purposes other than providing directory assistance. Section 251(b)(3) imposes no such limitation on LECs, their affiliated DA providers, or CLECs, and the commenters have offered no basis in the Act or our rules for imposing such a restriction on competing DA providers.").

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Reversing this decision to allow ILECs to impose unilateral use restrictions on non-ILEC DA providers would discriminate against non-ILEC DA providers, stifle innovation in the DA services market, and undermine the procompetitive goals of the *First Report and Order*.¹²

Similarly, ILECs should not be permitted to limit the sharing or resale of subscriber information for purposes of providing DA and DA-related services.¹³ Nothing in Section 251(b)(3) permits or requires the imposition of such restrictions. Indeed, charging “market-based” as opposed to nondiscriminatory pricing (*i.e.*, the same charge the ILEC imputes to itself) for such use of the information would run afoul of the nondiscrimination requirement in Section 251(b)(3).¹⁴ Moreover, permitting such limitations would substantially undermine the ability of CLECs and other non-ILEC DA providers efficiently to provide DA services to consumers. For example, carriers and providers could be restricted in their ability to make use of outsourcing or third party arrangements (which the ILECs are free to use).

* * *

Accordingly, InfoNXX again urges the Commission to affirm that (1) ILECs must provide non-ILEC DA providers with access to all the subscriber information (including nonpublished subscriber information) made available to or used by the ILECs’ own operators and (2) ILECs may not restrict, by contract or otherwise, the use of subscriber information by non-ILEC DA providers for any purpose related to the provision of DA and DA-related services.

¹² SBC’s argument that use restrictions do not limit “access” to DA information as required under Section 251(b)(3), *SBC May 21 Ex Parte* at 3, is untenable. Taken to its logical conclusion, this argument would permit SBC to prohibit non-ILEC DA providers from disclosing any of its subscriber information to the public, which would effectively prohibit the non-ILEC DA provider from offering a DA service but would not restrict the party’s “access” to the listings. To have any effect, Section 251(b)(3) must require ILECs to provide nondiscriminatory access to *and use of* subscriber information for the purpose of providing telecommunications and related services.

¹³ See *SBC May 21 Ex Parte* at 2-3.

¹⁴ See *First Report and Order*, 16 FCC Rcd at 2752 (“LECs must offer access to their DA database at rates that do not discriminate among the entities to which it provides access.”).

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Please address any questions to the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Gerard J. Waldron". The signature is fluid and cursive, with the first name "Gerard" and last name "Waldron" clearly distinguishable.

Gerard J. Waldron

Mary Newcomer Williams

Attorneys for InfoNXX, Inc.

cc: Mr. William Maher
Ms. Michelle Carey
Mr. William Dever
Mr. Rodney McDonald
Mr. Christopher Libertelli
Mr. Matthew Brill
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Mr. Daniel Gonzalez
Mr. Scott Bergmann